

SOUTH AFRICA / JUDGMENT

Vergenoeg vir Seniors v Stone and Others (JA 45/08) [2010] ZALAC 35 (4 June 2010)

[2010] ZALAC 35

COURT

Labour Appeal Court

BEFORE

Tlaletsi, Patel, Hendricks

CASE / FILE NUMBER

JA 45/08

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IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JA 45/08

In the matter between:

Vergenoeg vir Seniors Appellant

and

Stone, P N.O. 1st Respondent

The Commission for Conciliation, 2nd Respondent

Mediation and Arbitration

M Zimo & 7 Others 3rd Respondent

Judgment

Tlaletsi JA

Introduction

- [1] This is an appeal against a judgment of the Labour Court given by Mokgoathleng AJ in a review application that was brought to that Court by the appellant to have a certain arbitration award reviewed and set aside. The arbitration award related to a dispute about payment of severance package between the appellant and third and further respondents. The arbitration award was issued by the first respondent (“the commissioner”) under the auspices of the second respondent, the Commission for Conciliation, Mediation and

Arbitration (“the CCMA”). Leave to appeal was granted pursuant to a petition to the Judge President of this Court after an application for leave to appeal was not granted by Mokgoathleng AJ.

Factual background

- [2] Most of the facts relevant for the determination of the appeal are either common cause or not in dispute. The appellant is an association not for gain incorporated in terms of section 21 of the Company Act 25 of 1967. The appellant is conducting a “frail, residential and community care centre” in Villieria and in Mamelodi for the aged. The third and further respondents (“the individual employees”) were employed by the appellant as care givers.
- [3] During 2003 the appellant outsourced the functions that were performed by the individual employees and their other colleagues to a third party service provider Fidelity Supercare Services (Pty) Ltd (“Fidelity”) as part of its restructuring. The restructuring was necessitated by the appellant’s financial difficulties. What contributed to the financial difficulties is that the government had reduced the subsidies payable to the appellant for the ensuing financial year. The appellant consulted with the trade union representatives of the individual employees over a period of about two months. It is not disputed that the said consultation were conducted in terms of section 189 of the Labour Relations Act 66 of 1995 (“the Act”). It is also common cause that the outsourcing of the service did not take place under the circumstances provided for in section 197 of the Act.
- [4] In the process of its operations the appellant negotiated with Fidelity to employ the individual employees. The proposal was accepted by Fidelity. In turn the appellant entered into negotiations with the individual employees and other affected employees so that they could take up positions with Fidelity. The appellant gave the employees a choice of either accepting retrenchment with payment of full severance package or to take up alternative employment procured with Fidelity without severance package. These negotiations took place during June 2003.
- [5] Pursuant to these negotiations the individual employees were on 22 August 2003 given retrenchment notices. The penultimate paragraph of the said letter reads:

‘Vergenoeg has made an arrangement with another company whereby you could stay in employment. This company is willing to evaluate you to make a possible offer to work as a care worker, here or at another institution. If you want to be evaluated, please inform Me O’Callaghan before 9 September 2003. If you accept an offer of employment with this company, you will not be entitled to severance pay, but the leave credit and pro-rata bonus will still be paid out.

Please feel free to approach Management with any uncertainties. You are requested to sign for the receipt of this letter.”

The date of the termination of employment was recorded as 30 September 2003.

- [6] There is no letter on record either from the individual employees or their union rejecting the offer to take up employment with Fidelity or formally accepting the offer. What is common cause though is that the individual employees acting on the offer made by the appellant, presented themselves for evaluation and accepted and concluded employment contracts with Fidelity. It needs to be mentioned though that they accepted a salary which was eight percent (8%) less than what the appellant used to pay them. They commenced employment with Fidelity on 1 October 2003. This was a day after termination of their employment with the appellant.
- [7] It is not in dispute that those employees of the appellant who qualified for pension chose to go on early retirement. Some took their severance pay and left the workplace. The individual employees were paid their leave credit and pro-rata bonuses only as they opted to take up employment with Fidelity.
- [8] After a period of three months having been in the employ of Fidelity, the individual employees pursued a severance pay dispute against the appellant at the CCMA. They contended that they were entitled to be paid severance packages as they had been dismissed for reasons relating to the employer's operational requirements. Unsurprisingly, the appellant denied that they were entitled to severance pay and contended that the individual employees elected to accept alternative employment procured by the appellant instead of severance packages.
- [9] It needs to be mentioned that the fairness of the termination of the individual employee's employment with the appellant for operational requirements was never challenged. They also did not dispute the fact that it was in fact the appellant who procured employment for the individual employees with Fidelity.

Arbitration proceedings

- [10] In the award the commissioner recorded that the issue to be decided was whether the individual employees are entitled to severance pay in terms of section 41 of the Basic Conditions of Employment Act 75 of 1997 ("the BCEA") and if so, what the quantum thereof would be. Having done so, the commissioner found that in this matter there was no alternative offer of employment to the individual employees by the appellant but merely facilitation by the appellant of the opportunity to apply for alternative employment with a different employer. The commissioner found himself in agreement with the argument that the "arbitrator has no place interfering with an agreement" but qualified it by stating that this was on condition that there was "no transgression by an employer of any employment related legislation or infringement of employees' rights". He found the agreement entered into by the appellant and the individual employees not to be permitted by the BCEA and that since the individual employees were dismissed for operational requirements, they were therefore entitled to severance pay in terms of section 41 of the BCEA.

[11]Consequently the commissioner “ordered” the appellant to pay the individual employees severance pay within ten (10) days of the award and granted the parties leave to continue with the arbitration should they not be in agreement as to the quantum of severance pay payable to the individual employees.

Proceedings in the Labour Court

[12]Aggrieved by the award of the commissioner the appellant approached the Labour Court seeking a review and setting aside of the award of the commissioner. The appellant, relying on section 145 of the Act, contended that there were defects in the arbitration proceedings before the commissioner in that he exceeded his powers in terms of the Act, failed to properly, rationally and justifiably apply his mind to the facts or the law, and that the award made by the commissioner is not justifiable in relation to the reasons given for such award.

[13]The Labour Court held that the findings by the commissioner that:

13.1 appellant did not offer the individual employees alternative employment within its entity, but only facilitated that they procure employment;

13.2 severance pay is a minimum right of any employee dismissed for operational reasons;

13.3 the parties could not lawfully enter into a contract in conflict with the provisions of section 49(3) of the BCEA,

“cannot be faulted”. The Court a quo concluded that “in my view the [commissioner] correctly found that the [individual employees] were dismissed in terms of section 189 of the [Act] and consequently were statutory entitled to severance pay” (sic). The application for review was consequently dismissed with costs.

The appeal

[14] The appellant has raised several grounds in its Notice of Appeal to challenge the decision of the Labour Court. These grounds mostly relate to the factual findings of the Labour Court on the evidence presented at the arbitration proceedings. They are about the failure by the Labour Court to properly consider or determine the undisputed evidence that it was through the efforts of the appellant that the individual employees were able to secure alternative employment and further that the appellant’s efforts ought to be construed as an offer of alternative employment. During argument before us Mr Snyman on behalf of the appellant sought to rely on the ground that there was a mutually consensual agreement between the appellant and the individual employees and their union to terminate their employment which meant that they were not dismissed. Since there was no dismissal, goes the argument, the individual employees were not entitled to severance pay. However, Mr Snyman correctly conceded that this Court need not determine whether there was a dismissal or not since this was never a ground upon which the decision of the Labour Court was challenged.

[15] The applicable section 41(4) of the BCEA provides that:

“An employee, who unreasonably refuses to accept the employer’s offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of subsection (2)”.

[16] This Court had an occasion to interpret the provisions of section 41(4) of the BCEA in *Irvin & Johnson Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2006) 27 ILJ 935 (LAC). In the judgment Zondo JP considered relevant provisions of the Constitution of the Republic of South Africa (Act 108 of 1996), the ILO Convention 158, The Termination of Employment Convention, foreign and local decisions and academic writings on the subject. I can do no better than to quote at length what the Learned Judge President had to say in conclusion about the interpretation of section 41(4):

“[44] It seems to me that the effect of s 41(4) is that, where the employer has arranged alternative employment for an employee who is facing a (possible) dismissal for operational requirements, either in his employ or in the employ of another employer, three scenarios are possible:

- The one scenario is that the employee unreasonably refuses such alternative employment in which case s 41(4) applies and the employee

forfeits the right to severance pay.

- The second scenario is where the employee reasonably refuses such alternative employment in which event he is entitled to payment of severance pay.
- The third scenario is where the employee accepts the alternative employment in which event he also forfeits the right to severance

pay.

[45]It will be seen from the three scenarios set out above that in no scenario does an employee get both the severance pay and the

alternative employment. However, there is a scenario where he gets neither. That is where he has himself to blame because he has acted unreasonably in refusing the offer of alternative employment. Where he has refused the offer of alternative employment but cannot be said to have acted unreasonably in doing so, he still gets paid his severance pay.

[46]Save for the provisions of s 41(4), the provisions of s 41 and the manner in which severance pay is calculated suggest that the reason for the payment of severance pay has something to do with the years that the employee has devoted to the service of the employer. However, s 41(4), as already stated earlier, seems to have a lot [more] to do with giving the employer an incentive to try to get alternative employment for the employee than with punishing the employee for unreasonably not taking up a job offer that he should have taken. What is quite clear to me is that, if s 41 were to be construed to mean that an employee who has accepted the employer's offer of alternative employment is entitled to severance pay, s 41(4) would become superfluous. I say this because s 41(4) takes the employee's right to severance away if such employee unreasonably refuses the employer's offer of alternative employment with that employer or another employer. If it is held that an employee who accepts the employer's offer of alternative employment with

that employer or another employer retains his right to severance pay, there would be no need for an employee to refuse the employer's offer anymore because, if he refused it, he would risk losing the right to severance pay in case his refusal is later found to be unreasonable, but there would be no such risk if he simply accepted the offer, commenced in the new job but resigned shortly thereafter. A statute should not, generally speaking, be given a construction that will render it or some of its provisions redundant or superfluous if there is a construction that can reasonably be given to it which would not have such effect or result. In such a case he would be entitled to severance pay in circumstances in which a refusal of the offer would have resulted in his forfeiture of his right to severance pay because such refusal would have been unreasonable. So, to avoid that risk and ensure that he gets his severance pay, he accepts the employer's offer of alternative employment when he knows that he actually doesn't want it and won't stay in it (My underlying).

[17] In my view, the above quotation aptly captures the correct legal position. The Labour Court in its judgment did not follow this

binding ratio. Neither did the Labour Court attempt to distinguish the said decision from the facts of the case under review.

[18] The facts in the Irvin & Johnson case are somewhat similar to the facts of this case. Mr Masipa who appeared on behalf of the individual employees before us sought to distinguish the two cases on the basis that in casu, the appellant could not have offered alternative employment as the individual employees had to be evaluated first. This argument loses sight of the fact that it was common cause throughout the entire process of the matter that the appellant negotiated with Fidelity to employ the employees and that as a result of the appellant's efforts the individual employees were employed. Furthermore, there is nothing in section 41(4) to suggest that the offered employment should be with the same employer and not any other employer. On the contrary section 41(4) refers to alternative employment "with that employer or any other employer." In Irvin & Johnson case the employer arranged with a new entity that took over the service to employ the employees to be dismissed for operational requirements.

[19] In conclusion it is my view that the decision reached by the commissioner is a decision that a reasonable decision maker could not reach. The finding by the Labour Court that the commissioner correctly found that the individual employees were dismissed in terms of section 189 of the Act and as such were statutorily entitled to severance pay is not rational. Firstly, it has always been common cause that section 189 process was followed by the parties and that resulted in the termination of employment of the individual employees and their other colleagues. Secondly, it is not in all cases where there is dismissal in terms of section 189 that the employees would be entitled to severance pay. These are legal exceptions to payment of severance pay and this case is one such exception. That being the case, the award of the commissioner ought to have been reviewed and set aside by the Labour Court.

[20] As regards costs, it was correctly submitted on behalf of the appellant that should the appeal succeed, there should be no order as to costs. This submission was without hesitation accepted on behalf of the individual employees. I am of the view therefore that it would be in accordance with the requirements of the law and fairness that there be no order as to costs.

[21] In the result it is ordered as follows:

1. The appeal succeeds and the order of the Labour Court is set aside and substituted with the following:

“(a) *The application for review succeeds,*

(b) The award of the commissioner under case number GA 38150-03 issued on 6 November 2004 is hereby reviewed and set aside.”

2. There is no order as to costs.

I agree.

Patel JA

I agree

Hendricks AJA

Representations:

For the Appellants : Mr S Snyman and Mr RJC Orton

Instructed by : Snyman Attorneys

For the Respondents: Adv R G Masipa

Instructed by : K P Seabi Attorneys

Date of judgment : 04 June 2010

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